No. ———

In The Supreme Court of the United States

October Term, 1997

Swidler & Berlin and James Hamilton,
Petitioners,

v.

United States of America,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

James Hamilton *
Robert V. Zener
Swidler & Berlin Chartered
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 424-7500
Counsel for Petitioners Swidler & Berlin and James Hamilton

* Counsel of Record

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

85 pp

QUESTIONS PRESENTED

1. Whether, when a client dies, the attorney-client privilege in a criminal proceeding is no longer absolute, but is subject to a balancing test that requires the attorney to produce evidence of privileged communications with the client if they "bear on a significant aspect" of the case "as to which there is a scarcity of reliable evidence."

2. Whether, as a matter of law, an attorney's handwritten notes taken during an initial interview with a client do not receive the virtually absolute work product protection otherwise afforded to an attorney's "mental impressions," because at this stage the lawyer "has not sharply focused or weeded the materials" and exercised professional judgment as to what to record.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals were Swidler & Berlin, James Hamilton and the United States of America.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ——

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

Swidler & Berlin and James Hamilton petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The majority opinion of the court of appeals and a redacted version of the dissenting opinion are reported at 124 F.3d 230 and are printed in full at Pet. App. 1a-26a. The court's order on petition for rehearing, and the opinion dissenting from denial of rehearing (Pet. App. 27a-32a), are reported at 129 F.3d 637. The district court issued a separate opinion for each of the two subpoenas involved. The opinions, which are identical except for the docket numbers and caption, are not reported and are printed at Pet. App. 33a-42a and 43a-53a.

JURISDICTION

The court of appeals entered its judgment on August 29, 1997. The court entered the order denying a petition for rehearing on November 21, 1997. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 501 of the Federal Rules of Evidence and Rule 26(b)(3) of the Federal Rules of Civil Procedure appear at Pet. App. 54a-56a.

STATEMENT

On July 11, 1993, in the midst of intense public controversy about the White House Travel Office, White House Deputy Counsel Vincent Foster met with Washington, D.C., attorney James Hamilton to discuss possible legal representation. Before the conversation began, Mr. Foster asked Mr. Hamilton if the conversation was privileged and received assurance that it was. Pet. App. 41a. They then spoke for two hours, during which Mr. Hamilton took three pages of notes. Pet. App. 31a. Nine days later, Mr. Foster committed suicide.

On December 4, 1995, a federal grand jury, at the request of Independent Counsel, issued subpoenas to Mr. Hamilton and his law firm, Swidler & Berlin, seeking Mr. Hamilton's handwritten notes of this conversation. Mr. Hamilton and his firm filed motions to quash or modify. The district court (Chief Judge Penn) inspected the notes *in camera*. He found that "one of the first notations on the [notes] is the word: 'Privileged,' so it is obvious that . . . Foster . . . viewed . . . the notes of that conversation as privileged." Pet. App. 41a. He also found that the notes were prepared in anticipation of litigation and "reflect the mental impressions of the lawyer." Pet. App. 42a. The district court thus concluded that both the attorney-client and work product privileges barred disclosure. Pet. App. 42a.

The Court of Appeals for the District of Columbia Circuit reversed. Recognizing that "the communications at issue would be covered by the [attorney-client] privilege if the client were still alive," the court concluded that "the client's death calls for a qualification of the privilege." Pet. App. 2a. The "qualification" created by the court permits "post-death use [of the otherwise privileged communication] in criminal proceedings" where the prosecutor convinces the trial court that the "relative importance [of the communication] is substantial." Pet. App. 10a. In his briefs to the court of appeals, Independent Counsel had not advocated such a balancing process.

The court of appeals reasoned that the prospect of post-death revelation in the criminal context will trouble a client less than in the civil context, because after death "criminal liability will have ceased altogether" while civil liability "characteristically continues." Pet. App. 6a. The court recognized that a concern for survivors might stir a desire to protect the estate from civil liability, but did not discuss whether the same concern might foster an interest in protecting the living from criminal penalties. Pet. App. 6a. The court also "doubted" that the client's concerns for post-death reputation would be "very powerful; and against them the individual may even view history's claims to truth as more deserving." Pet. App. 7a.

As to the other side of the balance, the court concluded that the client's death heightens the prosecutor's need for otherwise privileged communications. The court concluded that "unavailability through death, coupled with the non-existence of any client concern for criminal liability after death, creates a discrete realm (use in criminal proceedings after death of the client)" where the privilege should give way upon the prosecutor's showing of need. Pet. App. 7a-8a.

The court of appeals also held that the notes were not protected by the work product privilege. The court recognized prior decisions holding that attorney interviews

conducted "as part of a litigation-related investigation" receive heightened work product protection even as to factual material, because "the facts elicited necessarily reflected a focus chosen by the lawyer." Pet. App. 13a. However, the court concluded that the present case is different because "the interview was a preliminary one initiated by the client. Although the lawyer was surely no mere potted palm, one would expect him to have tried to encourage a fairly wide-ranging discourse from the client, so as to be sure that any nascent focus on the lawyer's part did not inhibit the client's disclosures." Pet. App. 13a. Because of the court's conclusive presumption that, at this stage, the lawyer "has not sharply focused or weeded the materials," it concluded that the notes did not deserve the "super-protective envelope" normally afforded opinion work product. Pet. App. 13a-14a.

Judge Tatel dissented. While conceding that concern for surviving friends and family or posthumous reputation "may not influence *every* decision to confide potentially damaging information to attorneys," Judge Tatel concluded that "these concerns very well may affect *some* decisions, particularly by the aged, the seriously ill, the suicidal, or those with heightened interests in their posthumous reputations." Pet. App. 23a (emphasis in original). Judge Tatel argued that, after the court's decision, such persons will not talk candidly with a lawyer after they receive the advice the court's opinion now requires lawyers to give:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. *But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution.* Now, please tell me the whole story.

Pet. App. 20a (emphasis in original). Judge Tatel concluded that the court's decision "strikes a fundamental

blow to the attorney-client privilege and jeopardizes its benefits to the legal system and society." Pet. App. 26a.

The court of appeals denied Appellees' petition for rehearing *in banc*, with two dissents as to the attorney-client privilege issue (Judges Tatel and Ginsburg).[1] Pet. App. 28a. The dissent emphasized that Independent Counsel had offered no "evidence" that abrogating the attorney-client privilege after death will not chill client communications with attorneys. Pet. App. 31a. Such evidence, the dissent argued, is required to overturn the common law rule that the privilege survives death—a rule resting on the proposition that it is necessary to promote candid client disclosures.

Judge Tatel also dissented on the work product issue. He disagreed with the court's conclusive presumption that attorney notes taken at an initial client interview do not reflect the attorney's mental impressions because the lawyer does not "sharply focus[] or weed[]" the words of a client at an initial session. Pet. App. 30a. Instead, Judge Tatel argued, "lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients." *Id.* "Whether courts can require production of attorney work product should turn not on the stage of representation or who initiates a meeting, but on whether the attorney's notes are entirely factual, or whether they instead represent the 'opinions, judgment, and thought processes of counsel'." Pet. App. 31a (citation omitted). Judge Tatel found that Mr. Hamilton had "created only three pages of notes" from a two-hour conversation, and that the notes "bear the markings of a lawyer focusing the words of his client; he underlined certain words, placing both checkmarks and question marks next to certain sections." *Id.* Consequently, Judge Tatel concluded, "[t]he notes clearly represent the opinions, judgment, and thought processes of counsel," the same conclusion the district court had reached. *Id.*

---

[1] Judges Sentelle and Garland did not participate.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision on attorney-client privilege is important and warrants this Court's review because it denies persons who expect to die soon—whether because of advanced age, illness, suicide, or a dangerous life-style—the right to consult attorneys in confidence about criminal matters that threaten friends, associates, family or their own reputations. The decision thus defeats the fundamental purpose of the privilege, which is to encourage full and frank communication between attorneys and clients and thereby promote observance of law and the administration of justice. The decision also conflicts with several state decisions denying posthumous disclosure of attorney-client communications in criminal cases, as well as with decisions of the Ninth Circuit and various state courts reaching the same conclusion in civil contexts. And the decision conflicts with the determination of many state legislatures that the privilege survives death.

The court of appeals' decision is wrong because it erroneously assumes that persons facing death do not care whether their friends, associates, family, or their own reputations are harmed by disclosures after death. This assumption wars with the fact that people write wills, establish trusts, buy life insurance and burial plots, establish foundations, endow chairs, and write memoirs—actions evincing concern for what happens to the well-being of others and their own reputations following death. The decision also is at odds with the decisions of this Court disparaging balancing tests and other standards that result in uncertain privileges. And it ignores the "reason and experience" (which must be considered under Federal Evidence Rule 501) exemplified by state court opinions and legislative pronouncements that are virtually unanimous in recognizing that the privilege remains intact after the client's death.

The court's decision on the work-product privilege will encourage attorneys not to take notes at initial client or

witness interviews, thereby damaging the quality of legal representation with no offsetting benefit to the administration of justice. The decision conflicts with decisions of this Court and several courts of appeals that accord the highest degree of work product protection to attorney notes containing factual statements where the manner of recordation reflects the attorney's selection and judgment. The decision is wrong because it presumes that attorneys at initial client interviews do not exercise professional judgment in determining what client statements to record and how to record them—a notion belied by the experience of seasoned practicing attorneys.

For these reasons, this Court should grant review on both issues.

1. The Attorney-Client Issue

a. Every year, hundreds of thousand of Americans learn that they have a life-threatening illness.[2] Many of these people may wish to talk to an attorney about matters with criminal implications. Yet under the court of appeals' decision they do so at peril because, after they die, prosecutors who show need for the evidence can obtain access to their attorneys' notes. The decision imposes the same impediment on the elderly, the suicidal, those engaged in hazardous lifestyles, and others concerned about mortality. It defies reason and experience to assume that many of these people do not care about disclosures that might harm others or their own reputation after death. By denying the full protections of the attorney-client privilege to such people, the decision discrimi-

---

[2] In 1993, some 665,000 persons died of cancer or as a consequence of HIV infection. U.S. Department of Commerce, *Statistical Abstract of the United States 1996* (1996), at 96. Given the nature of these diseases, it seems likely that most of these persons were aware for some period of time that they were likely to die soon. The American Cancer Society estimates that there were 1.3 million new cancer cases in 1996. *Id.* at 145.

nates against the aged, the diseased, and the distraught—against society's most vulnerable.

The decision's damaging effect is not ameliorated by the court's attempt to limit disclosure to "the discrete zone of criminal litigation" (Pet. App. 8a). A client's concern for family, friends and associates surely will extend to their potential criminal as well as civil liabilities. A dying person may be troubled far more by a loved one's possible incarceration that by some civil sanction. Especially given the increasing utilization of criminal law as a means of commercial and ethical regulation, a client who believes that death is a not-too-distant possibility will be loath to speak to a lawyer about troubles involving friends, family or close associates if advised that confidentiality evaporates upon his or her demise.

Nor will the client be reassured by the court of appeals' statement that disclosure is limited to statements whose "relative importance is substantial" (Pet. App. 10a). "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond*, 116 S.Ct. 1923, 1932 (1996) (patient-therapist privilege). Under the court's balancing test, the trial judge is most likely to perceive a need for privileged information in precisely those situations where the client would be most concerned about the criminal ramifications of disclosure on family, friends or associates. At the least, such a balancing test renders the attorney-client privilege uncertain, and "[a]n uncertain privilege is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). Surely, uncertainty of this sort will chill attorney-client communications.[3]

[3] The record demonstrates that Mr. Foster, had he not been assured the conversation was privileged, would not have confided in Mr. Hamilton and the notes at issue would not exist. Pet. App. 41a. Considering that the conversation occurred just nine days before Mr. Foster took his own life, he likely also would have been reluctant to confide had he been informed that the conversation was privileged *unless you die*.

There is no merit to the court of appeals' argument that the privilege already is so beset with exceptions that one more will make little difference. Pet. App. 8a-10a. The court cited the so-called "crime-fraud" exception, but for this exception to apply "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997). A client will know whether he or she consults an attorney to further a criminal or fraudulent scheme. For clients lacking such intent, advice that an improper purpose could destroy confidentiality will not undermine candor. The same cannot be said of advice that the privilege may perish with death when the client is elderly, severely ill, or suicidal.

There is, moreover, a basic flaw in the argument that one more exception to the privilege should not be unduly injurious, given those that exist. Despite the extant exceptions, the attorney-client privilege still is vital to our system of justice. All citizens—including the elderly and seriously ill—still have a right to talk to an attorney in confidence. The courts still have a paramount interest in assuring that clients tell their attorneys the whole truth. Most attorneys still take seriously their professional obligation to preserve confidences. Contrary to the panel's conclusion, in most circumstances "belief in an absolute attorney-client privilege" is not, and should not be, "illusory." (Pet. App. 8a) The court of appeals' reasoning can only further a progressive erosion of the privilege, for each added exception fuels the argument that yet one more can do little additional harm.

b. There is a conflict between the court of appeals' decision on attorney-client privilege and the holdings of other federal and state courts.

The decision conflicts with the holdings of seven states in criminal cases.[4] This Court has stressed the importance of uniformity between federal and state court decisions on privilege issues, because "any State's promise of confidentiality would have little value" if the client is aware that the confidential communication may be revealed in federal court. *Jaffee v. Redmond*, 116 S.Ct. 1923, 1930 (1996).

The court of appeals' decision also conflicts with decisions of the Ninth Circuit[5] and 13 states[6] holding that the attorney-client privilege survives the client's death in

---

[4] The following decisions excluded from criminal proceedings evidence of communications between a deceased person and that person's attorney: *Mayberry v. Indiana*, 670 N.E.2d 1262 (Ind. 1996); *In re a John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990); *People v. Modzelewski*, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994); *Arizona v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976), *cert. denied*, 439 U.S. 1006 (1978); *People v. Pena*, 198 Cal. Rptr. 819, 829 (Cal. Ct. App. 1984); *Cooper v. State*, 661 P.2d 905, 907 (Okla. Crim. App. 1983); *South Carolina v. Doster*, 284 S.E.2d 218, 220 (S.C.), *cert. denied*, 454 U.S. 1030 (1981).

[5] *United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977); *Baldwin v. Commissioner of Internal Revenue*, 125 F.2d 812, 815 (9th Cir. 1942). In *Osborn*, the disclosure had criminal implications; the district court had allowed intervenors to claim the Fifth Amendment privilege as to some documents at issue. 561 F.2d at 1336.

[6] *Doyle v. Reeves*, 152 A. 882 (Conn. 1931); *De Loach v. Myers*, 109 S.E.2d 777 (Ga. 1959); *Hitt v. Stephens*, 675 N.E.2d 275 (Ill. App. Ct.), *appeal denied*, 679 N.E.2d 380 (Ill. 1997)); *Estate of Voelker*, 396 N.E.2d 398 (Ind. Ct. App. 1979); *Bailey v. Chicago, Burlington & Quincy R.R. Co.*, 179 N.W.2d 560, 564 (Iowa 1970); *Stegman v. Miller*, 515 S.W.2d 244, 246 (Ky. 1974); *Rich v. Fuller*, 666 A.2d 71, 74-75 (Me. 1995); *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264 (Mo. Ct. App. 1976); *Lennox v. Anderson*, 1 N.W.2d 912 (Neb.), *modified on other grounds*, 3 N.W.2d 645 (Neb. 1942); *Clark v. Second Judicial District Court*, 692 P.2d 512 (Nev. 1985); *Taylor v. Sheldon*, 173 N.E.2d 892, 895 (Ohio 1961); *Miller v. Pierce*, 361 S.W.2d 623, 625 (Tex. Civ. App. 1962); *In re Smith's Estate*, 57 N.W.2d 727 (Wis. 1953).

civil cases. None of these cases recognizes a distinction between the civil and criminal contexts.

The court of appeals' attempt to limit its decision to criminal cases will not withstand scrutiny. If the court of appeals is correct in holding that a plausible claim of necessity in the criminal context allows posthumous disclosure, scant reason exists to deny posthumous disclosure where a party to civil litigation plausibly claims the evidence is critical. Moreover, disclosures made in the criminal context could be used in related civil matters.

With the exception of one case from a mid-level state appellate court that until now has never been followed,[7] there are only three situations in which the courts have allowed or suggested the propriety of posthumous disclosure of otherwise confidential attorney-client communications in criminal or civil proceedings. Disclosure is allowed in testamentary disputes for the purpose of determining the decedent's intent. Pet. App. 9a. *Glover v. Patten*, 165 U.S. 394, 406-08 (1897); *United States v. Osborn*, *supra*, 561 F.2d at 1340 n.11. But an exception designed to implement client intent does not support creating another exception to thwart it. Indeed, this Court's decision in *Glover v. Patten*, the leading case on the testamentary exception, is premised on the assumption that, except in the testamentary contexts, the privilege applies and bars disclosure.

Posthumous disclosure also has been allowed where a husband accused of murdering his wife attempts to use the privilege to bar his wife's lawyer from testifying that she told him of threats made by the husband. In those cases, the husband's obvious conflict of interest bars him from asserting the privilege on behalf of his wife.[8] No

---

[7] *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

[8] *Arizona v. Gause*, 489 P.2d 830 (Ariz. 1971), *vacated on other grounds*, 409 U.S. 815 (1972); *Wyoming v. Kump*, 301 P.2d 808 (Wyo. 1956).

such conflict of interest is present in the case at bar.[9]

Finally, there is dicta suggesting that a criminal defendant might have a constitutional right to obtain testimony from a lawyer that his or her deceased client admitted in a privileged conversation committing the crime at issue.[10] Disclosure of a privileged conversation to aid a criminal defendant would be consonant with case law holding that otherwise valid exclusionary rules may be overridden where the evidence is vital to the accused's exercise of his constitutional right to present a defense. *Davis v. Alaska*, 415 U.S. 308 (1974) (public disclosure of juvenile court record of prosecution witness).[11] But the Court need not reach this issue, because Independent Counsel's claim to the attorney notes in this case does not concern a criminal defendant's constitutional right to present evidence that may establish innocence.

c. Rule 501 of the Federal Rules of Evidence provides that a privilege "shall be governed by the principles of the common law," as interpreted in the light of "reason and experience." As described, the only other federal

---

[9] In a case where a husband suspected of his wife's murder refused the investigating district attorney's request to waive his wife's attorney-client or psychotherapist-patient privilege, the district attorney successfully petitioned the probate court to remove the husband as executor on the ground that he could not make a disinterested decision as to waiver. *District Attorney v. Magraw*, 628 N.E.2d 24 (Mass. 1994).

[10] *Massachusetts v. Goldman*, 480 N.E.2d 1023, 1029 n.8 (Mass.), *cert. denied*, 474 U.S. 906 (1985); *In re a John Doe Grand Jury Investigation*, *supra*, 562 N.E.2d at 71. Other courts, however, have refused to negate the privilege despite the asserted needs of criminal defendants. *Mayberry v. Indiana*, *supra*; *People v. Modzelewski*, *supra*; *Arizona v. Macumber*, *supra*; *South Carolina v. Doster*, *supra*.

[11] *See also*, *Weinstein's Federal Evidence* (2d ed.) § 412.03[4], citing cases holding that, in certain narrowly defined circumstances in rape prosecutions, constitutional concerns may require admission of evidence concerning the victim's past sexual conduct, despite state laws barring such evidence.

court of appeals holdings on the issue, as well as the overwhelming majority of state court holdings, confirm that the attorney-client privilege survives the client's death.[12] State case law is supported by numerous state statutes providing that the privilege may be claimed after death by the client's personal representative.[13] Obviously, these statutes rest on the assumption that the privilege survives death. "[I]t is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'" *Jaffee v. Redmond*, *supra*, 116 S. Ct. at 1930.

The court of appeals argues that, because these statutes are consistent with the notion that the privilege expires when the estate is closed, they involve only testamentary

---

[12] Dicta in federal court opinions are to the same effect. *Colonial Gas Co. v. Aetna Casualty & Surety Co.*, 144 F.R.D. 600, 604 (D. Mass. 1992); *Dixson v. Quarles*, 627 F. Supp. 50, 53 (E.D. Mich.), *aff'd mem.*, 781 F.2d 534 (6th Cir. 1985), *cert. denied*, 479 U.S. 935 (1986).

[13] "In general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client (either an executor or administrator)." *Restatement (Third) of the Law Governing Lawyers*, § 127, Comment c (Proposed Final Draft, March 29, 1996). That view also is reflected in the Model Code of Evidence, Rule 209(c)(1), and the Uniform Rules of Evidence, Rule 502(c). *See also* the discussion of state statutes by Judge Tatel in his dissent. Pet. App. 16a-17a. State statutes allowing the personal representative of the deceased to assert the privilege include: Ala. R. Evid., Rule 502; Alaska R. Evid. 503; Ark. Code Ann. § 16-41-101, Rule 502; Cal. Evid. Code § 953; Del. Code Ann., Del. R. Evid. 502; Fla. Stat. Ann. § 90.502; Haw. Rev. Stat. § 626-1, Rule 503; Idaho R. Evid. 502; Kan. Stat. Ann. § 60-426; Ky. R. Evid. 503; La. Code Evid. Ann. art. 506; Me. R. Evid. 502; Miss. R. Evid. 502; Neb. Rev. Stat. § 27-503; Nev. Rev. Stat. § 49.105; N.H. R. Evid. 502; N.J. Stat. Ann. 2A;84A, App. A, N.J. R. Evid. 504; N.M. Stat. Ann., N.M. R. Evid. 11-503; N.D. R. Evid. 502; Oh. Rev. Code Ann. § 2317.02; 12 Okla. Stat. Ann. § 2502; Or. Rev. Stat. § 40.225; S.D. Codified Laws § 19-13-4; Tex. R. Civ. Evid. 503 and Tex. R. Crim. Evid. 503; Vt. Stat. Ann., Vt. R. Evid. 502; Wis. Stat. Ann. § 905.03.

matters and thus do not indicate that the privilege survives death in a criminal context. Pet. App. 4a. Were the statutes generally so limited, one would expect to find language to that effect in them. But none of these statutes says that it is inapposite as to criminal matters or that the privilege expires when the estate closes. Certainly, the Arkansas statute, which governs Mr. Foster's still-open estate, does not.

d. The privilege's purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It misreads human nature to conclude that the typical client cares only about his or her own fate while alive, and thus will talk freely to an attorney despite knowing that the conversation may be used posthumously to damage his or her reputation or used in criminal proceedings against family or close associates. Where the client is elderly, severely ill or has other reasons to believe that death is near, this conclusion is particularly contrary to reason and common experience.

The principal support for the court of appeals' view derives from academic commentators. One text argues that "[o]ne would have to attribute a Pharaoh-like concern for immortality to suppose that the typical client has much concern for how posterity may view his communications." 24 Charles Alan Wright & Kenneth A. Graham, Jr., *Federal Practice and Procedure* § 5498, at 484 (1986). This far too dismissive comment overlooks the fact that many persons adhere to more contemporary, meaningful faiths that place great store in the value of a good name and concern for the well-being of family, friends and neighbors. Such beliefs and cares are hardly a relic of ancient times. Rather, reason and experience tells us that, despite the glib, cynical observations of some commentators, concerns about reputation and others after

death permeate our society, particularly among the aged and ill.

An elderly or terminally-ill person could well seek a lawyer's advice not only about preservation of his or her estate, but also about possible criminal activities of children, a spouse or close associates. But under the court of appeals' decision, such a person could not talk to a lawyer with an assurance of confidence about, for example, the suspected drug involvement of a child. Reason and experience teach that the court of appeals was simply wrong in supposing that, while people have a "motive to preserve their estates" to protect their heirs from economic loss, they do not care at least as much about potential criminal penalties inflicted on loved ones after their death. Pet. App. 6a.

There is also the very real concern that many people have for their own reputations—a concern that does not turn on whether some later proceeding is civil or criminal. The court of appeals expressed "doubt" that an individual's "residual" interest in post-mortem reputation "will be very powerful," suggesting that "the individual may even view history's claims to truth as more deserving." Pet. App. 7a. But anyone familiar with memoirs knows that most people who speak "for history" tend to choose words with extreme care. "Most public servants' memoirs turn out to be self-serving exercises in which their political decisions are retrospectively interpreted in the best possible light." [14] A respected recent memoirist has described how he went through his final draft "with a fine tooth comb" to assure that, while being honest, he would "not, at the same time, be hurtful," because he knew "everything you say will be in print forever." [15] The attorney-

[14] "We Can All Learn from McNamara's Memoirs," New York Times (April 13, 1995) at p. A24.

[15] "Colin Powell Talks About His Family, 'the Producers' and the Making of a Memoir," Chicago Tribune (Aug. 26, 1996) at p. C3. If we may be so bold, we also submit that judges carefully write opinions with a view to the opinions of posterity.

client privilege is designed to ensure that people, when speaking with counsel, do so with candor and need not edit their statements with a "fine tooth comb." [16]

e. This Court has long recognized that the grand jury's right to "every man's evidence" does not extend to "those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972). Where a privilege is qualified and thus subject to a balancing test, the need for the evidence in particular criminal cases may be a factor considered in the balance. *United States v. Nixon*, 418 U.S. 683, 711-12 (1974); *Branzburg, supra*, 408 U.S. at 708. But there is no precedent for subjecting the absolute privileges

[16] The conclusion that persons do not care about their post-death reputations and the fate of close associates is disputed by the facts of this case. Mr. Foster was a man who cared deeply about his reputation and the well-being of others. Judge Tatel has quoted from his May 1993 commencement speech about the value of reputation to him. Pet. App. 23a. Both Independent Counsel Fiske and even Independent Counsel Starr (who now generally minimizes the concern for posthumous reputation) concluded that attacks on Mr. Foster's reputation and others could have contributed to the depression that caused him to take his own life. Pet. App. 23a; Report of the Independent Counsel In Re Vincent W. Foster, pp. 8-17 (June 30, 1994); Report on the Death of Vincent W. Foster, Jr., by the Office of Independent Counsel In Re: Madison Guaranty Savings & Loan Association, pp. 105-10 (Oct. 10, 1997). Mr. Fiske also relates how Mr. Foster, upset that a colleague was reprimanded in the Travel Office matter, sought instead to take the blame himself. Mr. Foster's now famous note—likely written within hours of his visit to Mr. Hamilton—says, in obvious reference to himself, that in Washington "ruining people is considered sport." The note also complains that "the public will never believe the innocence of the Clintons and their loyal staff." *Id.* at Exhibit 5.

The court of appeals decision disregards Mr. Foster's concerns for his reputation and associates and would disclose notes of a conversation he sought to ensure was privileged. The decision thus is not only, as Judge Tatel said, a "fundamental blow" to the privilege generally, it is also a direct attack on Mr. Foster's wishes and intentions.

recognized at common law to a balancing test in a criminal cases.[17]

The balancing approach the court of appeals adopted is particularly damaging to the attorney-client privilege because potential violations of the law (including those by persons who survive the client's death) are a frequent subject of attorney-client conversations. To a much greater extent than any other type of privileged communication, attorney-client communications will be chilled and the purpose of the privilege undermined if those communications are subject to disclosure in criminal prosecutions. And as observed, if such communications are admissible in criminal proceedings, confidentiality effectively would be destroyed and little reason would remain to withhold the evidence from civil proceedings. In criminal as well as civil cases, the attorney-client privilege is so important in our system of justice that it "should not yield either before or after the client's death to society's interest, as legitimate as we recognize that interest is, in obtaining every man's evidence." *In re a John Doe Grand Jury Investigation, supra*, 562 N.E.2d at 71.

2. The Work Product Issue

The Court should also grant review of the important work-product privilege issue. In *Upjohn v. United States, supra*, this Court said that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements

[17] The privilege for marital communications survives death. *Curran v. Pasek*, 886 P.2d 272 (Wyo. 1994); *Merrill v. William Ward Ins. Co.*, 622 N.E.2d 743 (Ohio Ct. App. 1993); *Georgia Int'l Life Ins. Co. v. Boney*, 228 S.E.2d 731 (Ga. Ct. App. 1976). The patient-physician and patient-psychotherapist privileges, while not recognized at common law, have also been held to survive the patient's death. *Leritz v. Koehr*, 844 S.W.2d 583 (Mo. Ct. App. 1993); *Williams v. Kentucky*, 829 S.W.2d 942 (Ky. Ct. App. 1992); *Rittenhouse v. Superior Court*, 1 Cal.Rptr. 2d 595 (Cal. Ct. App. 1991); *Sims v. State*, 311 S.E.2d 161 (Ga. 1984).

is particularly disfavored because it tends to reveal the attorney's mental processes." 449 U.S. at 399. In so stating, the Court was explaining *Hickman v. Taylor*, 329 U.S. 495 (1947), which accorded work product privilege protection to an attorney's notes of oral statements by a potential witness.

In *Upjohn*, the Court noted a conflict in the circuits on the issue whether, under *Hickman*, "*no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses," or whether "such documents will be discoverable only in a 'rare situation.'" 449 U.S. at 401 (emphasis in original), citing *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973) (absolute protection); and *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979) (disclosure in a "rare situation"). While the Court did not resolve that conflict, the *Upjohn* decision provides no support for the court of appeals' conclusion that an *ordinary* showing of necessity is sufficient to obtain disclosure of attorney notes.

The court of appeals concedes that, where an attorney takes notes of "interviews conducted as part of a litigation-related investigation," the facts elicited "necessarily reflect[] a focus chosen by the lawyer." Pet. App. 13a. The court of appeals also concedes that, in these circumstances, the Fourth and Eleventh Circuit accord the attorney's notes—including factual material—"the virtually absolute protection that the [work product] privilege gives to the attorney's mental impressions." Pet. App. 13a, citing *In re Allen*, 106 F.3d 582, 607-08 (4th Cir.) *rehearing en banc denied*, 199 F.3d 1129 (4th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3298 (U.S. Oct. 10, 1997) (No. 97-642);[18] *Cox v. Administrator, U.S. Steel*, 17 F.3d 1386, 1422 (11th Cir.), *modified on rehearing on other grounds*, 30 F.3d 1347 (11th Cir.),

[18] Certiorari was denied on January 12, 1998, after the filing of the typewritten version of this petition.

cert. denied, 513 U.S. 1110 (1994). The court of appeals, however, attempted to distinguish these decisions on the ground that the interview in this case was "a preliminary one initiated by the client," and on that basis ruled that factual material in the notes was producible upon a showing that meets the "ordinary Rule 26(b)(3) standard" of necessity and unavailability of alternative evidence. Pet. App. 13a-14a.

The distinction between initial and later interviews is spurious. As Judge Tatel noted, "[n]o lawyer approaches a client's problems with a 'blank slate.' . . . Even at a first meeting, regardless of who initiates it, lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients." Pet. App. 30a.

Mr. Hamilton came to the meeting with Mr. Foster with considerable experience in representing clients in highly-publicized, "political" cases. As many attorneys do, he prepared for the "initial interview"; the record shows that he had read and taken notes on the White House's report on the Travel Office matter that was the subject of the interview. Pet. App. 40a, 41a. He thus was both knowledgeable and focused. To adopt a conclusive presumption that initial interview notes do not reflect the lawyer's mental impressions ignores both the reality of the practice of law and the reality of this case.

As Judge Tatel observed (Pet. App. 31a), the notes themselves demonstrate that Mr. Hamilton exercised his judgment during the interview. "In two hours, he created only three pages of notes," which were not verbatim but contained only what "he thought significant, omitting everything else." The notes, Judge Tatel said, bear various markings ("check marks and question marks") and "clearly represent the opinions, judgments, and thought processes of counsel." *Id.* Chief Judge Penn had reached the same conclusion for the district court. Pet. App. 42a.

The decision of the court of appeals is important and warrants review because it discourages attorneys from taking notes at initial client and witness interviews. It

conflicts with the Fourth and Eleventh Circuit decisions cited by the court of appeals, as well as the Third and Eighth Circuit decisions cited in *Upjohn*, all of which hold that attorneys' notes of witness interviews are not subject to production on an ordinary showing of necessity. *In re Allen, supra*; *Cox v. Administrator, U.S. Steel, supra*; *In re Grand Jury Proceedings, supra*; and *In re Grand Jury Investigation, supra*. More importantly, the opinion conflicts with *Upjohn*. These decisions cannot be convincingly distinguished on the basis that they did not involve initial client interviews, for the rationale of the court of appeals' opinion applies to both initial client and witness interviews.

The court of appeals' decision also is wrong as a matter of law. The issue is not, as the court of appeals argued, whether the attorney in an initial interview attempts to "encourage a fairly wide-ranging discourse." Pet. App. 13a. Rather, the issue is which portions of that "discourse" the attorney chooses to record and the words the attorney chooses to accomplish this. It is these choices the attorney's notes reflect and the work product privilege protects. *Upjohn v. United States, supra*, 449 U.S. at 399.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES HAMILTON *
ROBERT V. ZENER
SWIDLER & BERLIN CHARTERED
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 424-7500
Counsel for Petitioners
Swidler & Berlin and
James Hamilton

December 31, 1997

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued June 20, 1997 Decided August 29, 1997

No. 97-3006

IN RE: SEALED CASE

Consolidated with

No. 97-3007

Appeals from the United States District Court
for the District of Columbia
(No. 95ms00446)
(No. 95ms00447)

Before: WALD, WILLIAMS and TATEL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WILLIAMS.

Dissenting opinion filed by *Circuit Judge* TATEL.

WILLIAMS, *Circuit Judge*: This case arises out of a grand jury investigation into the firing of White House travel office employees. The Office of Independent Counsel obtained grand jury subpoenas for notes of a conversation between a now-deceased White House official and his private attorney. The attorney and his law firm moved in district court to quash the subpoenas, claiming successfully that the notes were protected by the attorney-client privilege and by the work-product privilege. Because we think

the district court read both privileges too broadly, we reverse and remand for further proceedings.

Attorney-Client Privilege

The attorney-client privilege applies to grand jury proceedings. Fed. R. Evid. 501, 1101(c) & (d). The parties agree that the communications at issue would be covered by the privilege if the client were still alive. The Independent Counsel, however, argues that the client's death calls for a qualification of the privilege. We agree.

Rule 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as . . . interpreted by the courts . . . in the light of reason and experience." Fed. R. Evid. 501; see also *Jaffee v. Redmond*, 116 S. Ct. 1923, 1927 (1996). We take this to be a mandate to the federal courts to approach privilege matters in the way that common law courts have traditionally addressed any issue—observing precedent but at the same time trying, where precedents are in conflict or not controlling, to find answers that best balance the purposes of the relevant doctrines.

Courts have generally assumed that the privilege survives death. See Simon J. Frankel, "The Attorney-Client Privilege After the Death of the Client," 6 Geo. J. Legal Ethics 45, 47 (1992) (citing cases). Modern evidence codes often provide that the personal representative of a deceased client may assert the privilege. See Restatement (Third) of the Law Governing Lawyers § 127 Reporter's Note, comment c (Proposed Final Draft, March 29, 1996) ("Restatement"). And courts have applied the privilege after death in both grand jury proceedings and criminal trials. See, e.g., *John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990); *People v. Pena*, 198 Cal. Rptr. 819, 829 (Ct.App.2d 1984); *State v. Doster*, 284 S.E.2d 218 (S.C. 1981).

Yet most judicial references to the persistence of the privilege after death appear to have occurred only as the prelude to application of a well recognized exception—for disputes among the client's heirs and legatees.[1] See Frankel, *supra*, at 58 n.56 (95% of cases examined (380 out of 400) were testamentary disputes). Thus holdings actually *manifesting* the posthumous force of the privilege are relatively rare. See McCormick on Evidence § 94, at 348 ("the operation of the privilege has in effect been nullified in the class of cases where it would most often be asserted after death."). And such cases as do actually apply it give little revelation of whatever reasoning may have explained the outcome.

The Supreme Court's decision in *Glover v. Patten*, 165 U.S. 394 (1897), is cited for the proposition that the privilege survives death. See, e.g., *Baldwin v. Commissioner of Internal Revenue*, 125 F.2d 812, 814 (9th Cir. 1942). In fact, however, *Glover* is simply a typical case that asserts the general principle of the privilege's survival after death, but finds it inapplicable to disputes among persons "claiming under the client." 165 U.S. at 407. Even the Court's endorsement of the privilege's survival in ordinary circumstances was rather tepid. It observed that "such communications might be privileged if offered by third persons to establish claims against an estate," *id.* at 406, and quoted *Russell v. Jackson*, 9 Hare 387, 393, 68 Eng. Rep. 558, 560 (1851), which stated only that "the privilege does not in all cases terminate with the death of the party," and belongs to "parties claiming under the

[1] The exception applies only when the parties are claiming "through the client," not when a party claims against the estate. Some have justified the exception as furthering the client's intent, while others have explained that in a will contest, the question of who may assert the privilege cannot be resolved without resolving the merits of the claims, and thus it is preferable to permit neither to assert the privilege. See 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 197, at 377-78 (2d ed. 1994). As neither justification bears on our analysis, we need not choose between them.

client as against parties claiming adversely to him." *Id.*, quoted in *Glover*, 165 U.S. at 407. Compare Cal. Evid. Code § 954, comment (1997) ("[T]here is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged."). In short, there is little by way of judicial holding that affirms the survival of the privilege after death, and the framing of the posthumous privilege as belonging to the client's estate or personal representative both suggests that the privilege may terminate on the winding up of the estate and reflects a primary focus on civil litigation.[2]

Although courts often cite as axiomatic the proposition that the privilege survives death, commentators have, with one distinguished exception, generally supported some measure of post-death curtailment. The exception, Wigmore, proclaimed that there was "no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate." 8 Wigmore on Evidence § 2323, at 630-31 (McNaughton Rev. 1961). But others have sharply criticized his view. The most emphatic statement is that of Wright & Graham, who wrote, "One would have to attribute a Pharaoh-like concern for immortality to suppose that the typical client has much concern for how posterity may view his communications." 24 Charles A. Wright & Kenneth W. Graham, Federal Practice and Procedure: Evidence § 5498, at 484 (1986); see also Restatement § 127, comment d ("Permitting such dis-

[2] Our dissenting colleague evidently reads the provisions allowing the personal representative of the deceased to claim the privilege as implying that the privilege survives death without exception (other than the standard testamentary one). See Dissent at 3. But the inference is far from clear. Vesting the privilege in the personal representative is plainly consistent with its terminating at the winding up of the estate, when its function of protecting the decedent's transmission of his or her property to the intended beneficiaries, free from claims based on statements to counsel, has run its course. Such vesting does not remotely suggest concern over anyone's criminal responsibility.

closure would do little to inhibit clients from confiding in their lawyers")[3]; 1 McCormick on Evidence § 94, at 350 (4th ed. 1992) (terminating the privilege at death "could not to any substantial degree lessen the encouragement for free disclosure"); 2 Mueller & Kirkpatrick § 19, at 380 ("Few clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense").

Presumably depending on their confidence in their judgments as to the residual chilling effect on clients commentators have proposed a range of substitute rules. Some have embraced Learned Hand's view that the privilege should not apply at all after death, see, e.g., ALI Proceedings, 1942, quoted in 24 Wright & Graham § 5498, at 485; 1 McCormick on Evidence § 94, at 350, while the American Law Institute has suggested a general balancing test, proposing that

> a tribunal be empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance. The tribunal could balance the interest in confidentiality against any exceptional need for the communication. The tribunal also could consider limiting the proof or sealing the record to limit disclosure.

Restatement § 127, comment d.

The justification for the attorney-client privilege has largely been an instrumental one, resting on a belief that it greatly facilitates—perhaps is essential to—the provision of legal advice. Such assistance "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). In addition, some have

[3] Drafts of portions of the Restatement (Third) of the Law Governing Lawyers, including § 127, have been tentatively approved by the American Law Institute's Council and membership but have not yet been finally adopted.

spoken of privacy concerns, see Frankel, *supra*, at 53-54 & nn.41-45 (citing commentators), but it seems fair to say that these have played at best a secondary role. In any event, because the privilege obstructs the truth-finding process, it is, we have said, to be narrowly construed. *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672, 675 (D.C. Cir. 1979).

The object, presumably, is to maximize the sum of the benefits of confidential communications with attorneys and those of finding the truth through our judicial processes. Even if the focus were solely on truth-seeking, dispensing with the privilege altogether would presumably have negative results. Any rule qualifying the privilege may in at least some cases (once it is adopted) cause some clients to confide less in their attorneys; the communication that is stillborn can never be dislclosed. And abrogation of the privilege would clearly impair the provision of legal services. Except to the extent that limits on the privilege *actually* chill the hoped-for communications, however, its application renders judicial proceedings less accurate.

Wright & Graham's supposition that favoring survival of the privilege after death requires imputing a "Pharaoh-like concern" to clients may be a bit of an exaggeration. But it is surely true that the risk of post-death revelation will typically trouble the client less than pre-death revelation. The question is how much less, and the answer seems likely to depend on the context. On one side, criminal liability will have ceased altogether. Civil liability, on the other hand, characteristically continues, and the same impulses that drive people to provide for their families in life clearly create a motive to preserve their estates thereafter.[4] In the middle are reputational concerns. To the

[4] The impulse would also apply to a corporation with which a decedent has been involved, but the privilege there would characteristically belong to the corporation. See, e.g., *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1977). Thus rules

extent that concern over reputation arises from an interest in the sort of treatment a person will receive from others —ranging from mundane matters such as extension of credit to more subtle ones such as how one will be greeted at social events—it ends with death. But there are aspects of after-death reputation that will concern a person while alive—the value to surviving family of being related to (say) an honorable and distinguished person, and the value of one's posthumous reputation simpliciter (the pure Pharaoh effect). In the sort of high-adrenalin situation likely to provoke consultation with counsel, however, we doubt if these residual interests will be very powerful; and against them the individual may even view history's claims to truth as more deserving. To the extent, then, that any post-death restriction of the privilege can be confined to the realm of criminal litigation, we should expect the restriction's chilling effect to fall somewhere between modest and nil.

The costs of protecting communications after death are high. Obviously the death removes the client as a direct source of information; indeed, his availability has been conventionally invoked as an explanation of why the privilege only slightly impairs access to truth. American Bar Association's Committee on the Improvement of the Law of Evidence, quoted in 8 Wigmore § 2299, at 579. Thus the fewer, and the more questionable the remaining sources (e.g., because of witnesses' interest or bias), the greater the relative value of what the deceased has told his lawyer. Although witness unavailability alone would not justify qualification of the privilege, we think that unavailability through death, coupled with the non-existence of any client concern for criminal liability after death,

regarding termination of the privilege on the biological death of the client are largely irrelevant. For a discussion of the privilege and organizational successors, see 24 Wright & Graham § 5499; 2 Mueller & Kirkpatrick § 200; see also *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (corporate bankruptcy trustee controls and therefore may waive the privilege).

creates a discrete realm (use in criminal proceedings after death of the client) where the privilege should not automatically apply. We reject a general balancing test in all but this narrow circumstance.

In rejecting two rather ambiguous limitations for privileges—the so-called "control-group" qualification of the attorney-client privilege, *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and a "balancing" test for the psychotherapist-patient privilege, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996)—the Supreme Court observed, "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393; *Jaffee*, 116 S. Ct. at 1932. Accordingly, to the extent that the commentators may be read as urging some sort of generalized balancing test for posthumous limitations of the privilege, we disagree. We thus embrace the arguments for such an exception only within the discrete zone of criminal litigation. While we believe that a case-by-case balancing is appropriate *within* that realm, we see no basis for any further exception (apart of course from the long-established exception for litigation among those claiming under the decedent).

Even such a discrete exception, of course, complicates what the lawyer must tell an anxious client about the confidentiality of a prospective conversation. But in assessing that incremental complication, we recognize that even now any belief in an absolute attorney-client privilege is illusory. See Edna S. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 3 (1997) ("Many communications that clients and lawyers mistakenly believe are privileged in fact are not."). First, even communications made in confidence in the search for legal advice are unprotected if they relate to future illegality (the "crime-fraud exception"). See Wright & Graham § 5501. The dissent contends that a client can be certain whether his communications will fall under the crime-

fraud exception, but this underestimates its slipperiness. We have acknowledged that "there may be rare cases . . . in which the attorney's fraudulent or criminal intent defeats a claim of privilege even if the client is innocent," *In re Sealed Case*, 107 F.3d 46, 49, n.2 (D.C. Cir. 1997), citing *In re Impounded Case (Law Firm)*, 879 F.2d 1211, 1213-14 (3d Cir. 1989), which indeed applies the exception in the face of client innocence. And the exception applies not only to crimes and fraud, but to other intentional torts. See *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (applies to "crime, fraud or other misconduct"); see also *Irving Trust Co. v. Gomez*, 100 F.R.D. 273, 277 (S.D.N.Y. 1983) (communications unprotected where client who wrongfully deprived another of use of his bank funds reasonably should have known that such conduct constituted "fraud or any other intentional tort"); *Diamond v. Stratton*, 95 F.R.D. 503, 505 (S.D.N.Y. 1982) (no protection where communication in furtherance of intentional infliction of emotional distress).

There is also the ubiquitous exception for litigation between persons claiming under the decedent—although in many contexts (including most imaginable conversations about the White House travel office firings) the improbability of its application would be readily apparent at the outset of the client-lawyer communication. Although this exception is sometimes justified as reflecting the decedent's likely intent, see note 1 *supra*, it does not perfectly track that idea; a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed. Further, in some states the privilege does not survive the winding up of an estate, Cal. Evid. Code § 954, and in others it may not do so, see Restatement § 127, Reporter's Note, comment c; 24 Wright & Graham § 5498, at 485.[5] Finally, even courts

[5] The record reveals nothing of the status of the decedent's estate in this case, and the Independent Counsel makes no claim based on its status.

applying the privilege to bar statements of a decedent from a criminal trial have acknowledged that a defendant might in some cases have a constitutional right to offer statements that exonerate him. *John Doe Grand Jury Investigation*, 562 N.E.2d at 71-72 (privilege survives death except where mandated by constitutional considerations); *State v. Doster*, 284 S.E.2d 218, 220 (S.C. 1981) (court upholds exclusion of communications, saying that the defendant was denied not the right to establish his defense but merely "the license to fish into privileged communications"). Compare *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (state interest in anonymity for juvenile offender cannot trump defendant's right of confrontation).

While some of these exceptions are within the client's control, that cannot be said of all. Thus a lawyer who tells his client that the expected communications are absolutely and forever privileged is oversimplifying a bit. (Given the likely impatience of the client with what may seem legalistic detail, the oversimplification may be justifiable; we need not say.) Accordingly the incremental uncertainty introduced by this exception is hardly devastating. And admission of an exception limited to post-death use in criminal proceedings produces none of the murkiness that persuaded the Court in *Upjohn* and *Jaffee* to reject the limitations proposed there.

Even in the realm of criminal proceedings (including grand jury proceedings), this exception should apply only to communications whose relative importance is substantial. Thus, the statements must bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence. Where there is an abundance of disinterested witnesses with unimpaired opportunities to perceive an unimpaired memory, there would normally be little basis for intrusion on the intended confidentiality. This should limit release to contexts where not only is the risk of chilling effect slight but

keeping the communications secret would be quite costly. Cf. *In re Sealed Case*, 116 F.3d 550, 577 (D.C. Cir. 1997) (need shown where "it is likely that the subpoenaed materials contain important evidence and . . . this evidence, or equivalent evidence, is not practically available from another source").

Review by the district court *in camera* may play a role in application of this exception. Where the proponent has offered facts supporting a good faith reasonable belief that the materials may qualify for the exception (a standard plainly met here by the Independent Counsel), the district court should in its sound discretion examine the communications to see whether they in fact do. See *United States v. Zolin*, 491 U.S. 554, 570-72 (1989). To the extent that the court finds an interest in confidentiality, it can take steps to limit access to these communications in a way that is consonant with the analysis justifying relaxation of the privilege.[6] See 2 Mueller & Kirkpatrick § 199, at 380-81.

Work-Product Privilege

The work-product privilege created by *Hickman v. Taylor*, 329 U.S. 495 (1947), may in some cases protect more material than the attorney-client privilege, because it "protects both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share." *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982). The "opinions, judgments, and thought processes of counsel" are generally protected, and the person seeking them must show extraordinary justification. *Id.* at 809-10. For relevant, nonprivileged facts, however, their being embodied in work product

---

[6] In considering the interest in confidentiality, the court may in appropriate circumstances protect innocent third parties from disclosure as well. Here, of course, Federal Rule of Criminal Procedure 6(e)'s provision of secrecy for grand jury proceedings gives additional protection.

merely shifts the standard presumption in favor of discovery, so that they are discoverable where the person seeking discovery satisfies the standard of Rule 26(b)(3) of the Federal Rules of Civil Procedure, which requires a showing of "substantial need" and "the inability to obtain the substantial equivalent of the information . . . from other sources without 'undue hardship.'" *Id.* at 809 n.59 (identifying that language as an expression of *Hickman*'s "adequate reasons" formula).[7]

The district court found that the notes were protected by the work-product privilege because they "reflect the mental impressions" of the attorney. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Court observed that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." *Id.* at 399. But the Court did not decide whether factual elements embodied in such notes should be accorded the virtually absolute protection that the privilege gives to the attorney's mental impressions. *Id.* at 401. Indeed, its reasoning seems to presuppose that such notes are analytically divisible; in refraining from formulation of a specific test, the Court said that the notes in question represented *either* communications protected by the attorney-client privilege (which was applicable, in contrast to the present case) *or* mental impressions protected by work-product privilege. *Id.*; see also *United States v. Paxson*, 861 F.2d 730, 736 (D.C. Cir. 1988) (noting that *Upjohn* did not formulate a test for factual matter embodied in lawyer's notes on conversations with

[7] Because of this apparent identity between the common law standard and that of Rule 26(b)(3), it appears to make little difference whether Federal Rule of Civil Procedure 81(a)(3) merely makes Rule 26 applicable to the procedure of litigation over grand jury subpoenas or also defines the substance of the privilege. See *In re Sealed Case*, 676 F.2d at 808 n.49.

witnesses and finding in the case before it no "strong showing" of necessity).

In *In re Sealed Case*, 856 F.2d 268 (D.C. Cir. 1988), a party asked Securities and Exchange Commission lawyers on deposition for their *recollections* of witness interviews. Citing *Upjohn*, 449 U.S. at 401-02, we said that "[a]s the work product sought here is based on oral statements from witnesses, a far stronger showing is required than the 'substantial need' and 'without undue hardship' standard applicable to discovery of work-product protected documents and other tangible things." *Sealed Case*, 856 F.2d at 273. And in *Allen v. McGraw*, 106 F.3d 582, 607-08 (4th Cir. 1997), the court upheld the privilege as to the *contested* portion of an attorney's memo of an interview, observing that those portions "tend[ed] to indicate the focus of [the lawyer's] investigation, and hence, her theories and opinions regarding this litigation." See also *Cox v. Administrator, U.S. Steel*, 17 F.3d [illegible], 1422 (11th Cir. 1994).

All three of the above cases involved interviews conducted as part of a litigation-related investigation. (Our *Sealed Case*, 858 F.2d 268, in addition involves unrecorded recollections of interviews and was thus not within the coverage of Rule 26(b)(3). Accordingly, as *Allen* reasoned, the facts elicited necessarily reflected a focus chosen by the lawyer. Here the interview was a preliminary one initiated by the client. Although the lawyer was surely no mere potted palm, one would expect him to have tried to encourage a fairly wide-ranging discourse from the client, so as to be sure that any nascent focus on the lawyer's part did not inhibit the client's disclosures.

Accordingly, unless the general possibility that purely factual material may reflect the attorney's mental processes (either in questioning or in recording) is enough to shroud all lawyers' notes in the super-protective envelope

reserved by Rule 26(b)(3) for "mental impressions," we think such material should be reachable when true necessity is shown. Where the context suggests that the lawyer has not sharply focused or weeded the materials, the ordinary Rule 26(b)(3) standard should apply.

Our brief review of the documents reveals portions containing factual material that could be classified as opinion only on a virtually omnivorous view of the term. We cannot therefore accept the district court's conclusion that they are protected in their entirety.

* * *

We reverse and remand the case to the district court to reexamine the documents in light of this opinion. The documents may be redacted so that the grand jury receives only those portions that are protected by neither the attorney-client nor the work-product privilege.

So ordered.

TATEL, *Circuit Judge*, dissenting: * Offered no persuasive reason to depart from the common law's posthumous protection of the attorney-client privilege and appreciating its importance in encouraging "full and frank communication" by clients with their lawyers, I would affirm the distirct court's judgment that the privilege protects the attorney's notes of his conversation with his now-deceased client. I therefore need not consider whether the notes are attorney work product.

I

Finding its first expression in the courts of Elizabethan England, *see* 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961), and accepted in the courts of the United States from the earliest days of the republic, *see, e.g., Chirac v. Reinicker*, 24 U.S. 280, 294 (1826), the attorney-client privilege is the oldest privilege for confidential communications known to the common law. Extending well beyond protecting the interests of clients, the privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promte[s] broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Fully informed lawyers participating in the legal system as officers of the court sharpen the adversary process, thus improving the quality of judicial decisionmaking and the development of the law. By encouraging individuals to consult lawyers and disclose to them candidly and fully, the attorney-client privilege also allows the nation's legal profession to help individuals understand their legal obligations and facilitate their voluntary compliance with them. Such voluntary compliance is particularly important to a free society which neither has nor should want sufficient law enforce-

---

* In order to preserve the secrecy of the grand jury proceedings, selected portions of this dissent have been deleted from the published opinion.

ment resources to search out and punish every violation of every law. *See id.; see also Trammel v. United States,* 445 U.S. 40, 51 (1980); *In the Matter of a John Doe Grand Jury Investigation,* 562 N.E.2d 69, 70 (Mass. 1990).

The attorney-client privilege recognizes that sound legal advice does not "spring from lawyers' heads as Athena did from the brow of Zeus," *In re Sealed Case,* 737 F.2d 94, 99 (D.C. Cir. 1984), but instead depends "upon the lawyer's being fully informed by the client." *Upjohn,* 449 U.S. at 389. Although on occasion the attorney-client privilege can "ha[ve] the effect of withholding relevant information from the fact-finder," *Fisher v. United States,* 425 U.S. 391, 403 (1976), courts sustain the privilege in individual cases to accomplish its larger systemic benefits —the greater law compliance and fairer judicial proceedings resulting from the "sound legal advice [and] advocacy" the privilege promotes. *Upjohn* at 389.

Like the spousal, priest-penitent, and psychotherapist-patient privileges, the attorney-client privilege is " 'rooted in the imperative need for confidence and trust.' " *Jaffee v. Redmond,* 116 S. Ct. 1923, 1928 (1996) (quoting *Trammel,* 445 U.S. at 51). As the Supreme Court recognized more than a century ago, the assistance of counsel "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn,* 128 U.S. 464, 470 (1888). Because individuals frequently seek legal counsel concerning embarrassing, disgraceful, or criminal conduct, "the mere possibility of disclosure" of communications about such subjects may "impede development of the confidential relationship," *Jaffee,* 116 S. Ct. at 1928, thereby eroding the substantial benefits to the justice system afforded by well-informed legal counsel. Lawyers who have represented clients in sensitive matters know the key words to full disclosure:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. Now, please tell me the whole story.

Since at least the mid-nineteenth century, the common law has protected the attorney-client privilege after a client's death. *See, e.g., Hart v. Thompson's Executor,* 15 La. 88, 93 (1840) (upholding privilege after client's death); SIMON GREENLEAF, 1 TREATISE ON THE LAW OF EVIDENCE 310 (1850) (privilege not affected by death of client). Other than in testamentary disputes, for which there exists a well-established and independently justified exception not applicable to the case before us, *see, e.g., Glover v. Patten,* 165 U.S. 394, 406-08 (1897), both state and federal courts have consistently followed the common law rule, whether the privilege is claimed in civil litigation, *see e.g., United States v. Osborn,* 561 F.2d 1334 (9th Cir. 1977); *Baldwin v. Commissioner of Internal Revenue,* 125 F.2d 812, 814 (9th Cir. 1942); *People v. Pena,* 198 Cal. Rptr. 819, 828 (Cal. Ct. App. 1984); *Lamb v. Lamb,* 464 N.E.2d 873, 877 (Ind. Ct. App. 1984); *Bailey v. Chicago, Burlington & Quincy R.R. Co.,* 179 N.W.2d 560, 564 (Iowa 1970), or in criminal proceedings, *see, e.g., State v. Macumber,* 544 P.2d 1084, 1086 (Ariz. 1976); *John Doe Grand Jury Investigation,* 562 N.E.2d at 72; *People v. Modzelewski,* 611 N.Y.S.2d 22, 23 (N.Y. App. Div. 1994); *Cooper v. State,* 661 P.2d 905, 907 (Okla. 1983); *State v. Doster,* 284 S.E.2d 218, 219 (S.C. 1981); *see also* 8 WIGMORE, EVIDENCE § 2323 & n.2 (citing additional cases). Incorporated in the model codes of evidence, *see id.* § 2292 n.2 (quoting Uniform Rule of Evidence § 26(1)); MODEL CODE OF EVIDENCE, Rule 209(c)(i) (1942), adopted by the Supreme Court's Advisory Committee, *see* 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 521 (discussing Standard 503), and codified by at least twenty state legislatures, *see, e.g.,* GREGORY P. JOSEPH & STEPHEN A. SALZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES

§ 24.2 (1992) (citing 19 state codes); CAL. EVID. CODE § 953 (West 1995), the common law rule admits "no exception" that outside the testamentary context, the attorney-client privilege survives the client's death. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmt. d (Proposed Final Draft No. 1, 1996); *see also id.* (citing additional authorities); EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 234 (3d ed. 1997) ("The duration of the privilege, once it attaches, persists unless the lawyer is released by the client. Upon the death of the client, no release is possible. Hence death should seal the lawyer's lips forever.").

Although rarely articulated, the rationale underlying the common law rule makes sense. By preserving the privilege after the client's death, the law ensures that the privacy afforded those who confide in counsel extends to those who would otherwise take their secrets to the grave. The common law rule thus encourages individuals to seek legal advice, bringing the benefit of such consultation to themselves, the legal system, and society. *See Fisher*, 425 U.S. at 403 ("As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."). As Wigmore explains:

> The subjective freedom of the client, which it is the purpose of the privilege to secure . . ., could not be attained if the client understood that, when the relation ended or even after the client's death, the attorney could be compelled to disclose the confidences, for there is no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate.

8 WIGMORE, EVIDENCE § 2323.

II

Justifiably unwilling to embrace the Independent Counsel's call for wholesale abrogation of the privilege in federal criminal cases after a client's death, the court today adopts a balancing test under which posthumous availability of the privilege turns on an ex post facto assessment of the evidence's importance, a test that neither party to this litigation advocates and that, notwithstanding protestations to the contrary, Maj. Op. at 3-4, represents a dramatic departure from the common law rule. The court cites no cases supporting its new rule, relying instead on views of commentators never accepted by any court or legislature. *See, e.g.*, 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5498 (1986 & Supp. 1997); Maj. Op. at 4-5. The court sees particular significance in a draft revision of the Restatement (Third) of the Law Governing Lawyers supporting a posthumous exception to the common law rule. Maj. Op. at 5. The Restatement, however, candidly acknowledges that "no court or legislature has adopted" such an exception. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, cmt. d (Proposed Final Draft No. 1, 1996). The court also observes that the common law rule is most often stated in cases involving the testamentary exception and that "holdings actually *manifesting* the posthumous force of the privilege are relatively rare." Maj. Op. at 3. These observations prove nothing. Such holdings appear rarely not because judicial recognition of a posthumous privilege is "tepid," *id.* at 3, but because situations where the attorney-client privilege is challenged after a client's death occur rarely. Most significantly, in all but one reported case where the attorney-client privilege was challenged after a client's death, courts have upheld the privilege, even where the result denied critical information to the trier of fact. *See, e.g., John Doe Grand Jury Investigation*, 562 N.E.2d at 72 (attorney could not be compelled

to testify about what deceased client told him prior to committing suicide, even though the testimony might have brought an end to murder investigation); *Macumber*, 544 P.2d at 1068 (trial court properly excluded testimony of two attorneys that a person other than the defendant had confessed to them of committing the murder for which defendant was tried); *see also* Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45, 65 (1992). *But see Cohen v. Jenkintown Cab Co.*, 357 A.2d 689, 693 (Pa. Super. Ct. 1976) (where testimony sought did not contain "scandalous and impertinent matter which would serve to blacken the memory" of the deceased client, and where need for testimony is "clearly established," court could compel attorney to testify).

There is a very good reason why no case law supports my colleague's new balancing test: unless clients know before consulting their lawyers exactly what information the privilege protects—knowledge denied by the court's balancing test—few will confide candidly and fully. After this decision, lawyers will have to add an important caveat to what they advise their clients about confidentiality:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. *But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution.* Now, please tell me the whole story.

Because clients so advised will not know whether their confidences will be protected, they will be less likely to disclose sensitive or potentially inculpatory information. "If the purpose of the attorney-client privilege is to be served," said the Supreme Court in *Upjohn*, "the attorney and client must be able to predict with some degree of

certainty whether particular discussions will be protected." *Upjohn*, 449 U.S. at 393. As the Court put it, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* Consistent with this reasoning, federal courts uniformly hold that where applicable, the attorney-client privilege, unlike qualified privileges, *see, e.g., In Re Sealed Case*, 116 F.3d 550 (D.C. Cir. 1997) (dealing with executive privilege and requiring specific demonstration of evidence's importance to grand jury investigation and unavailability from other sources), cannot be overridden by a showing of need. *See, e.g., Admiral Ins. Co. v. United States Dist. Ct. for the Dist. of Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989) (conditional protection of work product doctrine "cannot logically be extended to support an unavailability exception to the attorney-client privilege"); *In re Grand Jury Subpoena*, 599 F.2d 504, 510 (2d Cir. 1979) (attorney-client privilege is unqualified); MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 2.01, at 2-7 to 2-8 (citing cases and noting that "once the privilege has been held applicable, information protected thereunder may not be the subject of compelled disclosure regardless of the need or good cause shown"). For the same reasons and citing *Upjohn*, the Supreme Court, in the case of the psychoanalyst privilege, rejected a balancing test which, like the one the court adopts today, turned in large part on the importance of the information sought by the prosecution: "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee*, 116 S. Ct. at 1932.

My colleagues characterize the absolute nature of the attorney-client privilege as "illusory." Maj. Op. at 8. Pointing to the testamentary exception and to the well-accepted proposition that statements relating to future il-

legality find no protection in the attorney-client privilege, they suggest that their new exception, limited to criminal proceedings after the client's death, will likewise not weaken the privilege. Both the testamentary exception and the exclusion of statements of future criminality, however, differ significantly from the balancing test the court adopts today. In those two situations, clients know up front with certainty that the statements they make are unprotected by the privilege. Beyond those two clear situations, clients and their lawyers cannot predict whether a client's statement might some day relate to a criminal investigation, much less whether a court applying my colleagues' balancing test will subsequently decide that the information "bear[s] on a significant aspect of the crimes at issue." *Id.* at 10. Because of this uncertainty, the court's balancing test produces precisely the same "murkiness that persuaded the Court in *Upjohn* and *Jaffee* to reject the limitations proposed there." *Id.* at 10.

The court believes its balancing test will not damage the attorney-client privilege because people are generally indifferent to the effect posthumous disclosures of confidences could have on their reputations. This assumption of the unimportance of posthumous reputation, however, runs counter to the rationale underlying the common law rule. *See* Frankel, *The Attorney-Client Privilege After the Death of the Client* at 61-63 & n.91. It also defies both common sense and experience. From Andrew Carnegie's libraries to Henry Ford's foundation, one need only count the schools and universities, academic chairs and scholarships, charitable foundations, research institutes, and sports arenas—even Acts of Congress—bearing the names of their founders, benefactors, or authors to understand that human beings care deeply about how posterity will view them. Evidence of concern for surviving friends and family likewise abounds: people write wills, convey property, buy life insurance, invest for their children's education, and make guardianship arrangements to protect the interests of

loved ones. Prominent public officials restrict access to their papers to protect reputations. Of course, such concerns may not influence *every* decision to confide potentially damaging information to attorneys. But because these concerns very well may affect *some* decisions, particularly by the aged, the seriously ill, the suicidal, or those with heightened interests in their posthumous reputations, I cannot accept the court's assumption that the attorney-client relationship will not suffer if the privilege is limited after a client's death. I agree with the Supreme Judicial Court of Massachusetts: "to disclose information given to [an attorney] by a client in confidence, even though such disclosure might be limited to the period after the client's death, would in many instances . . . so deter the client from 'telling all' as to seriously impair the attorney's ability to function effectively." *John Doe Grand Jury Investigation*, 562 N.E.2d at 71.

The facts of the present case vividly illustrate the value a person can place on reputation. As the Independent Counsel acknowledges, *see* Appellant's Br. at 10 n.4, his predecessor, Independent Counsel Robert Fiske, found that the Travel Office matter caused Foster distress and may have contributed to his decision to take his own life. Appellee's Br. at 22 (citing Report of the Independent Counsel In Re Vincent W. Foster, Jr. 10-14 (June 30, 1994)). Revealing the value he placed on personal reputation, Foster told law students in a commencement address shortly before his death: "There is no victory, no advantage, no fee, no favor which is worth even a blemish on your reputation for intellect and integrity. . . . The reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy." *Id.* Foster committed suicide nine days after confiding in his attorney. Although I concede that no single case can prove the utility of maintaining the privilege beyond a client's death, this case seems a particularly inappropriate one in which to abrogate the common law's posthumous protection of the attorney-client privilege.

The court suggests that because it limits its balancing test to criminal cases and because criminal liability ceases with death, its test will not chill client communications with their lawyers. Maj. Op. at 6-7. But clients often reveal to their lawyers much more than information about their own criminal liability: they may disclose information that could expose friends, family, or business associates to criminal culpability—which does not terminate with the client's death—as well as information that could damage their own reputations. The possible release of such information could chill the attorney-client relationship just as seriously as the release of information about the client's own criminal liability.

The court claims that unless the privilege terminates at the client's death, information will be lost that could have been sought from the client while alive. *Id.* at 7. The common law rule, however, long ago determined that the benefits the legal system gains through recognizing the privilege posthumously outweigh whatever damage might flow from denying information to the factfinder in a particular case. Further balancing on a case by case basis will undermine the privilege. Moreover, if limiting the scope of the privilege deters "full and frank" attorney-client communication, as the common law assumes, who can say that in the absence of the privilege information later sought in criminal proceedings would have been shared with counsel in the first place? As the Supreme Court explained in the psychotherapist privilege context, "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Jaffee*, 116 S. Ct. at 1929; *see also* Salzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 610 (1980) ("The privilege creates a zone of privacy in which an attorney and client can create information that did not exist before and might not exist otherwise.") Clients will be particularly reluctant to share critical information with their lawyers in cases where both the client's death and the possibility of criminal investigation are foreseeable. Perhaps this is such a case, for at oral argument, the deceased's lawyer told us:

> I am not sure of a lot of things in life. I am not certain of why Mr. Foster took his own life, even though I think it's because of the taxing of his reputation and his fear about the trial of this investigation. . . . But I am totally certain, I am totally certain of one thing . . . If I had not assured Mr. Foster that our conversation was a privileged conversation, we would not have had that conversation *and there would be no notes that are the subject of the situation today*. (Emphasis added.)

Nor can I see any way to limit the Court's "information loss" argument to cases in which the client has died. Witnesses unable to remember facts, incompetent to testify, or beyond the court's process likewise deny relevant information to the factfinder. Yet neither the Independent Counsel nor this court suggests that we abrogate the attorney-client privilege to fill in these evidentiary gaps. The unavailability of a witness likewise does no greater harm to the factfinding process than an available witness who testifies inaccurately. Again, no one would suggest that we call upon attorneys to corroborate or correct their clients' every statement. The reason is simple: accepting that some information may be lost to a factfinder, we insulate the attorney-client relationship from the prospect of these intrusions in order to promote the " 'confidence and trust,' " *Jaffee*, 116 S. Ct. at 1928 (quoting *Trammel*, 445 U.S. at 51), necessary for the relationship to work and to afford society its benefits. *See Admiral Insurance Co.*, 881 F.2d at 1494 ("Any inequity in terms of access to information is the price the system pays to maintain the integrity of the privilege."). Neither the court nor the Independent Counsel has offered any convincing reason why a client's death should be treated differently than these other circumstances.

At the end of its discussion of the attorney-client privilege, the court suggests that district courts could protect

clients' interests by ordering that their lawyers' testimony be kept confidential. Maj. Op. at 10. But evidence essential to the prosecution's case at trial cannot ultimately remain confidential. In any event, the privilege's fundamental purpose is to encourage clients to share information with their lawyers, not to maintain the information's confidentiality. Qualified promises of confidentiality—"Don't worry, if I am compelled to reveal what you tell me, the court will make sure that no one hears it other than the U.S. Attorney and the federal grand jury"—are unlikely to encourage worried clients to make candid and full disclosures to their attorneys.

III

The court's decision too readily dismisses the continuing vitality of the common law rule in the states. "It is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'" *Jaffee*, 116 S. Ct. at 1930 (quoting *Funk v. United States*, 290 U.S. 371, 376-81 (1933)). The fact that the common law's posthumous recognition of the privilege outside testamentary disputes appears to have been embraced by every state that has codified the privilege—and remains the law in those that have not—counsels against casting it aside simply because the Independent Counsel and a few commentators question its usefulness. That the common law rule was likewise adopted by the Supreme Court's Advisory Committee, as well as by the committees who drafted the Model Code of Evidence and the Uniform Rules of Evidence, reinforces the conclusion that "'reason' and 'experience'" support posthumous protection of the attorney-client privilege. *Id.*; *Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195 & n.6 (8th Cir. 1981) (Supreme Court Proposed Federal Rule of Evidence 503(c) useful "as a source for defining the federal common law of attorney-client privilege").

Because the court's balancing test strikes a fundamental blow to the attorney-client privilege and jeopardizes its benefits to the legal system and society, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed November 21, 1997

No. 97-3006

IN RE: SEALED CASE

Consolidated with
No. 97-3007

Appeals from the United States District Court
for the District of Columbia
(No. 95ms00446; No. 95ms00447)

BEFORE: EDWARDS, *Chief Judge*; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

On Appellees' Suggestion
for Rehearing *In Banc*

ORDER

Appellees' Suggestion for Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

A statement of *Circuit Judge* TATEL dissenting from the denial of rehearing *in banc*, in which *Circuit Judge* GINSBURG joins with respect to the issue of attorney-client privilege, is attached.

Circuit Judges SENTELLE and GARLAND did not participate in this matter.

TATEL, *Circuit Judge*, with whom GINSBURG, *Circuit Judge*, joins with respect to the issue of attorney-client privilege, dissenting from the denial of rehearing *in banc*: Dramatically departing from the common law rule that protects the attorney-client privilege after a client's death, and threatening the vitality of that privilege, this case raises issues of exceptional importance worthy of *in banc* consideration. *See* FED. R. APP. P. 35(a)(2). The case especially warrants *in banc* review because the consequences of the court's new balancing test will extend far beyond federal criminal cases in the District of Columbia. Clients involved in civil or criminal proceedings anywhere in the country have no way of knowing whether information they share with their lawyers might someday become relevant to a federal criminal investigation in Washington, D.C. As the Supreme Court noted regarding the psychotherapist privilege, "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930 (1996).

As I pointed out in my dissent, the common law rule has been incorporated in the Uniform Rules of Evidence and the Model Code of Evidence, adopted by the Supreme Court's Advisory Committee, and codified by at least twenty state legislatures. *In re Sealed Case*, 124 F.3d 230, 238 (D.C. Cir. 1997) (Tatel, J., dissenting). The Independent Counsel cites two cases that have abrogated the privilege after a client's death, but neither is relevant here. In both *State v. Gause*, 489 P.2d 830 (Ariz. 1971), and *State v. Kump*, 301 P.2d 808 (Wyo. 1956), courts held that an accused husband could not invoke the privilege on behalf of his dead wife to bar his wife's lawyer from testifying, a situation quite different from this case where the attorney himself has invoked the privilege on behalf of his deceased client. As the court in *Gause* said, "the privilege is that of the client and must be claimed by the client or someone authorized by law to do so on the client's behalf." *Gause*, 489 P.2d at 834. Until this court's decision, only one reported case—a never-cited opinion of a mid-level Pennsylvania appellate court—actually supported posthumous abrogation of the privilege when asserted by the lawyer in a nontestamentary dispute. *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

According to the Independent Counsel, empirical support is "nonexistent" for the proposition that abrogating the attorney-client privilege after the client's death will chill client communication. Opposition of the United States to Appellees' Petition for Rehearing With Suggestion for Rehearing In Banc at 12. But because the Independent Counsel himself urges overturning the common law rule, and because that rule rests on the proposition that preserving the attorney-client privilege after the client's death is necessary to promote client disclosure, the Independent Counsel bears the responsibility of producing evidence to the contrary. In place of such evidence, he offers only his opinion that "any hypothesized chilling effect would be minimal," *id.*, citing only this court's opinion that it "ex-

pect[s]" its balancing test's "chilling effect to fall somewhere between modest and nil," *Sealed Case*, 124 F.3d at 233. Without convincing evidence that abrogating the privilege will do no harm to client communications, this court should not abandon centuries of common law.

Invoking a parade of horribles not before us, the Independent Counsel claims that injustice will result if courts cannot abrogate the attorney-client privilege after the client's death. While in some cases the privilege will deny information to the trier of fact, it does so in order to promote a broader and more important value—encouraging the free flow of information from client to lawyer. The common law long ago determined that the benefits gained by recognizing the privilege posthumously outweigh whatever damage might flow from denying information to the trier of fact in any particular case. *Id.* at 241 (Tatel, J., dissenting).

Petitioner also seeks rehearing *in banc* with respect to the court's work product ruling. *Id.* at 235-37. Because drawing a precise line between fact and opinion work product is a difficult and sensitive question with serious implications for the attorney-client relationship, and because I think the court has drawn the line in the wrong place, this issue also warrants *in banc* review.

The court's conclusion that because the interview was "preliminary" and "initiated" by the client, the lawyer may not have "sharply focused or weeded" the words of the client, *id.* at 236, reflects a view of the lawyer's role very different from my own experience. No lawyer approaches a client's problems with a "blank slate." Appellee's Petition for Rehearing With Suggestion for Rehearing En Banc at 14. Even at a first meeting, regardless of who initiates it, lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients. Of course lawyers may want to encourage wide-ranging discussions at first meetings, but they do so in order to draw out and

record information they think might be important. Unless they take verbatim notes, the questions they ask and those facts they write down reflect their own views about what is important to their client's case. Whether courts can require production of attorney work product should turn not on the stage of representation or who initiates a meeting, but on whether the attorney's notes are entirely factual, or whether they instead represent the "opinions, judgments, and thought processes of counsel." *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).

The notes in this case demonstrate quite clearly that the lawyer actively exercised his judgment when interviewing his client. In two hours, he created only three pages of notes. Far from taking verbatim notes, the lawyer obviously wrote down what he thought was significant, omitting everything else. The notes bear the markings of a lawyer focusing the words of his client; he underlined certain words, placing both checkmarks and question marks next to certain sections. The notes clearly represent the opinions, judgments, and thought processes of counsel.

After this decision, no lawyer will risk having his notes end up before a grand jury because of a judicial finding that he had not "sharply focused or weeded" the words of the client; lawyers will simply stop taking notes at early, critical meetings with clients. Not only will this damage the ability of lawyers to represent their clients but in the end there will be no notes for grand juries to see. Similar consequences, of course, may flow from the court's new attorney-client privilege balancing test; advised that their disclosures might be unprotected after death, clients may simply not talk candidly. As the Supreme Court noted in the psychotherapist privilege context, "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Jaffee*, 116 S. Ct. at 1929. This court's two new holdings—one chilling client disclosure, the other chilling lawyer note-

taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process.

APPENDIX C

[Filed Jan. 7, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-446 JGP
(UNDER SEAL)

IN RE GRAND JURY NO. 95-1
Subpoena *duces tecum* to
SWIDLER & BERLIN

ORDER

The Memorandum Order filed in this matter on December 16, 1996 is corrected to reflect the following change in the caption: "IN RE GRAND JURY NO. 95-2" in place of "IN RE GRAND JURY NO. 95-1."

SO ORDERED

[Jan. 4, 1997]

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

[Filed Dec. 16, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-446 JGP
(UNDER SEAL)

IN RE GRAND JURY No. 95-1
Subpoena *duces tecum* to
SWIDLER & BERLIN

MEMORANDUM ORDER

This matter comes before the Court of the Motion To Quash Or Modify Grand Jury Subpoena. Actually, there are two subpoenas, one issued to James Hamilton, an attorney, and the other to Hamilton's law firm, Swidler & Berlin.[1] This litigation arises out of the so-called "Whitewater" investigation being conducted by Independent Counsel Kenneth Starr. As a part of that investigation, the Independent Counsel is also investigating the circumstances surrounding the death of Vincent Foster, who served as Deputy White House Counsel. Also pending before the Court are the Motions To Intervene, filed by Lisa Foster, Mr. Foster's widow, and Sheila Anthony, Mr. Foster's sister. The Court will grant the motions to intervene.

Very briefly, the underlying facts are as follows: On the evening of July 20, 1993, Vincent Foster was found dead of a gunshot wound in Fort Marcy Park, Virginia. On the following day, the Foster family retained Hamilton and Swidler & Berlin to represent them.[2] Hamilton Affidavit,

---

[1] A separate matter and case number have been assigned for each case.

[2] The family members represented include Foster's wife, Lisa Foster, his children, Vincent, Laura and John Brugh Foster, his mother, Alice Mae Foster, his sisters, Sharon Bowman and Sheila Anthony, and Beryl Anthony, Sheila Anthony's husband. Hamilton Affidavit, ¶ 3.

¶ 3. The movants assert that "[a]fter extensive investigations, the United States Park Police, the Department of Justice, Independent Counsel Robert Fiske,[3] and Senate Banking Committee, among others, concluded that he [Vincent Foster] had committed suicide in Fort Marcy Park." Hamilton Affidavit, ¶ 1.

Hamilton states that he was retained to represent the family because of his experience in litigation and civil, criminal and Congressional investigations, "particularly those involving highly-publicized matters." He asserts that he was not retained because of any expertise in probate, estate or business law. In considering the pending motions, the Court accepts those representations. He goes on to state that "from the outset" he and the law firm anticipated that litigation "could well occur in various forms." See Hamilton Affidavit, ¶¶ 18-32. Hamilton states that in the course of his representation of the family, he has spoken to "numerous persons, conducted substantial legal research, engaged in litigaton, and communicated our views in writing to various government bodies." Hamilton Affidavit, ¶ 17. He goes on to state that "[t]hroughout our representation we have on many occasions made notes of our conversations with third parties, our conversations with our clients, our internal firm conferences and analysis and our research, observations and analysis. These notes embody our mental impressions, conclusions, opinions, theories, thought processes, selection of topics of importance, and strategies. In our view, they are not only work product, but in many instances they are core work product." Hamilton Affidavit, ¶ 17. The movants contend that counsel anticipated that "litigation could result from overreaching investigations," that there might be Freedom

---

[3] Mr. Fiske was succeeded as Independent Counsel by Kenneth Starr.

of Information Act (FOIA) litigation "regarding Mr. Foster's now-famous note," that family members and their lawyers could become witnesses in litigation and in other proceedings, that litigation could result against famiiy members "if they misspoke in giving evidence," and that counsel anticipated "litigation by the family to protect the family's privacy interests, redress defamation, or remedy misuses of Mr. Foster's name and image."

The movants argue that the subpoenas are unreasonable and oppressive and should be quashed or modified because they seek materials protected by the work product doctrine and the attorney-client and common interest privileges.

After the motions to quash were filed, the Court required the movants to furnish the contested documents to the Court for its *in camera* review. The Court also required the movants to file a privilege log identifying the date, author, addressee and description of the documents and the privilege claimed for each document. The movants filed a privilege log and then an amended privilege log. The movants claim a privilege for all documents under the work product doctrine. With respect to a few documents, they claim, in addition to work product, attorney-client privilege, common interest privilege, or both.

As may be expected, the Independent Counsel has a much different view of the subpoenaed documents. He notes that the subpoenas were issued as part of Independent Counsel's grand jury investigation into possible criminal violations involving the death of Mr. Foster and to determine whether individuals made false statements or obstructed justice in connection with the investigation into the firing of employees of the White House Travel Office in May 1993. The Independent Counsel disputes the movants' claim that the work product doctrine is applicable under the acts in this matter based upon his contention that the grand jury "ordinarily" has a right to obtain "all" relevant non-privileged evidence and further because the

documents were not prepared in anticipation of litigation. Independent Counsel goes on to argue that even if a document was prepared in anticipation of litigation, that alone will not exempt it from production to the grand jury. He argues that a balancing test must be applied to determine whether disclosure is nevertheless warranted. Independent Counsel also argues against invocation of attorney-client privilege and the comman interest rule. Finally, the Independent Counsel draws a distinction between documents relating to conversations *before* the death of Vincent Foster and those documents created *after* his death.

The Court will now turn to a discussion of those privileges as they relate to the subject documents.

I

The most important issue raised in this document request is whether the documents sought by the Independent Counsel are protected from production under the work product doctrine. Any discussion of that doctrine or privilege must begin with the decision in *Hickman v. Taylor*, 329 U.S. 495, 76 S.Ct. 385 (1947). There, the Supreme Court observed:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion of opposing parties and their counsel. Proper preparation of a clients's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's cases, discovery may properly be had.

329 U.S. at 510-11, 67 S.Ct. A 393-94 (emphasis this Court's). Thirty-four years later, the Supreme Court reaffirmed the "strong public policy" underlying the work product doctrine in *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160 (1975). *Upjohn Company v. United States*, 449 U.S. 383, 398, 101 S.Ct. 677, 686 (1981).

The Court of Appeals for this Circuit has made clear that the work product doctrine applies to matters pending before a federal grand jury. *In re Sealed Case*, 308 U.S. App.D.C. 69, 29 F.3d 715 (1994). Moreover, that case is instructive because the court noted:

> In rejecting the appellant's assertion of the privilege, the district court indicated that the privilege was inapplicable because no grand jury investigation had commenced at the time. We disagree. The work product privilege protects any material obtained or prepared by a lawyer *"in the course of his legal duties, provided that the work was done with an eye toward litigation."* Even though the grand jury investigation had not begun when the Lawyer met with the appellant and prepared his file, he may well have had an eye toward litigation.

308 U.S.App.D.C. at 72, 29 F.3d at 718 (citations omitted, emphasis this Court's). The court went on to state: "In determining whether the materials in the Lawyer's files arre protected by the work product privilege, 'the testing question is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.* (citation omitted).

Although the movants resisted the preparation of a privilege log, the Court required them to submit a privilege log to the Court and Independent Counsel. After reviewing the privilege log, Independent Counsel advised the Court and the movants that the "the log has enabled us to cull out documents that we do not need or that are, in our view privileged. We thus are able to focus our argument to this Court on particular classes of documents."

II

Before addressing the documents now identified by the Independent Counsel based on the privilege log, the Court finds that all of the documents were prepared in anticipation of or with an eye toward litigation. This finding is based upon the affidavit of Mr. Hamilton and the Court's *in camera* review of the documents. The Court also observes that general experience in matters of this nature cannot help but lead all but the most unsophisticated person to conclude that there would be an investigation into the facts and circumstances of Mr. Foster's death and that

an eager media would seek to obtain materials which the family may wish to hold private. Moreover, political reality makes very clear that the matter would be subject to grand jury investigation, Congressional hearings and intense public scrutiny. It can hardly be doubted that, as Mr. Hamilton has stated, the material was collected with an eye toward litigation in one form or another.

After reviewing the privilege log, the Independent Counsel identified specific documents he wanted produced. The Court concludes that, with respect to those documents not so identified, the Independent Counsel has withdrawn his request for their production. As has the Independent Counsel, the Court will identify the documents by their "Bates" number or numbers. The Court will now discuss the documents in the order identified by Independent Counsel in his opposition to the motion.

Documents 2774-2883.

Independent Counsel has requested Documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains handwritten notes and notations in the form of comments and under linings made by James Hamilton. Movants assert a work product privilege and describe the document as: "Handwritten notes on 7/2/93 White House Travel Office Management Review Report made in anticipation of meeting with Vincent Foster concerning possible representation." The Court finds that this document, as described in the privilege log, should be exempt from disclosure to the grand jury. It contains notes and underlining which represent the mental impressions of the attorney. Although this document was prepared before Mr. Foster's death, the Court concludes that Foster was consulting Hamilton as an attorney and possibly to represent him. Finally in applying the balancing test for this document, the Court finds nothing in the document which would suggest that the grand jury's need for the document outweighs the privilege. This document need not be produced.

* * * *

[Two paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

* * * *

With respect to Hamilton's meeting with Foster on July 11, 1993, the Independent Counsel seeks documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains some handwritten notations in the form of comments and underlining made by James Hamilton. The Court finds that the movants have properly asserted work product with respect to this group of documents. Certainly there was a concern about the implications of certain actions and decisions of the White House Counsel and Mr. Hamilton reviewed the documents with this in mind. The notations and underlined portions of the document is evidence of Hamilton mental impressions.

Documents 490-492, 528-30, 569-71.

These documents are described in the privilege log as "[h]andwritten notes regarding conversation with Vincent Foster about possible representation." Movants claim work product and the attorney-client privilege. The three documents appear to be copies of the same document. Hamiltion is the author of the notes. The Court concludes that the notes are privileged. They were made at a time when Hamilton met with Foster to discuss possible representation of Foster. It appears clear that Foster spoke with Hamilton as an attorney and a review of the notes supports that finding. Moreover, one of the first notations on the document is the word: "Privileged," so it is obvious that the parties, Hamilton and Foster, viewed this as a privileged conversation and the notes of that conversation as privileged, both under the attorney-client privilege and as work product. These notes and others that are discussed are a demonstration of why "it is essential

that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. at 510, 67 S.Ct. at 393. The written notes reflect the mental impressions of the lawyer and there is nothing in the record which suggests that any need by the grand jury trumps the privileges. The documents need not be produced.

* * * *

[12 paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

* * * *

In sum, the Court concludes that the documents are privileged for the reasons stated above and further, that in applying a balancing test, the need of the grand jury does not outweigh the privileges asserted.

The Court has reviewed the remaining documents, including those no longer requested by the Independent Counsel, and concludes that they are privileged for the reasons stated in the privilege log.

It is hereby

ORDERED that the motions to intervene filed by Lisa Foster and Sheila Anthony are granted, and it is further

ORDERED that the motion to quash or modify grand jury subpoena is denied in part and granted in part; the motion to quash the subpoena is denied, and the motion to modify is granted in that, consistent with this Memorandum Order, Swidler & Berlin is not required to produce the documents described in the privilege log.

[Dec. 16, 1996]

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

APPENDIX D

[Filed Jan. 7, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-447 JGP
(UNDER SEAL)

IN RE GRAND JURY NO. 95-2
Subpoena *duces tecum* to
JAMES HAMILTON

ORDER

The Memorandum Order filed in this matter on December 16, 1996 is corrected to reflect the following change in the caption: "IN RE GRAND JURY NO. 95-2" in place of "IN RE GRAND JURY NO. 95-1."

SO ORDERED

[Jan. 4, 1997]

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

[Filed Dec. 16, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-447 JGP
(UNDER SEAL)

IN RE GRAND JURY No. 95-1
Subpoena *duces tecum* to
JAMES HAMILTON

MEMORANDUM ORDER

This matter comes before the Court on the Motion To Quash Or Modify Grand Jury Subpoena. Actually, there are two subpoenas, one issued to James Hamilton, an attorney, and the other to Hamilton's law firm, Swidler & Berlin.[1] This litigation arises out of the so-called "Whitewater" investigation being conducted by Independent Counsel Kenneth Starr. As a part of that investigation, the Independent Counsel is also investigating the circumstances surrounding the death of Vincent Foster, who served as Deputy White House Counsel. Also pending before the Court are the Motions To Intervene, filed by Lisa Foster, Mr. Foster's widow, and Sheila Anthony, Mr. Foster's sister. The Court will grant the motions to intervene.

Very briefly, the underlying facts are as follows: On the evening of July 20, 1993, Vincent Foster was found dead of a gunshot wound in Fort Marcy Park, Virginia. On the following day, the Foster family retained Hamilton

[1] A separate matter and case number have been assigned for each case.

and Swidler & Berlin to represent them.[2] Hamilton Affidavit, ¶ 3. The movants assert that "[a]fter extensive investigations, the United States Park Police, the Department of Justice, Independent Counsel Robert Fisks [3], and the Senate Banking Committee, among others, concluded that he [Vincent Foster] had committed suicide in Fort Marcy Park." Hamilton Affidavit, ¶ 1.

Hamilton states that he was retained to represent the family because of his experience in litigation and civil, criminal and Congressional investigations, "particularly those involving highly-publicized matters." He asserts that he was not retained because of any expertise in probate, estate or business law. In considering the pending motions, the Court accepts those representations. He goes on to state that "from the outset" he and the law firm anticipated that litigation "could well occur in various forms." *See* Hamilton Affidavit, ¶¶ 18-32. Hamilton states that in the course of his representation of the family, he has spoken to "numerous persons, conducted substantial legal research, engaged in litigation, and communicated our views in writing to various government bodies." Hamilton Affidavit, ¶ 17. He goes on to state that "[t]houghout our representation we have on many occasions made notes of our conservations with third parties, our conservations with our clients, our internal firm conferences and analysis and our research, observations and analysis. These notes embody our mental impressions, conclusions, opinions, theories, thought processes, selection of topics of importance, and strategies. In our view,

[2] The family members represented include Foster's wife, Lisa Foster, his children, Vincent, Laura and John Brugh Foster, his mother, Alice Mae Foster, his sisters, Sharon Bowman and Sheila Anthony, and Beryl Anthony, Sheila Anthony's husband. Hamilton Affidavit, ¶ 3.

[3] Mr. Fiske was succeeded as Independent Counsel by Kenneth Starr.

they are not only work product, but in many instances they are core work product." Hamilton Affidavit, ¶ 17. The movants contend that counsel anticipated that "litigation could result from overreaching investigations," that there might be Freedom of Information Act (FOIA) litigation "regarding Mr. Foster's now-famous note," that family members and their lawyers could become witnesses in litigation and in other proceedings, that litigation could result against family members "if they misspoke in giving evidence," and that counsel anticipated "litigation by the family to protect the family's privacy interests, redress defamation, or remedy misuses of Mr. Foster's name and image."

The movants argue that the subpoenas are unreasonable and oppressive and should be quashed or modified because they seek materials protected by the work product doctrine and the attorney-client and common interest privileges.

After the motions to quash were filed, the Court required the movants to furnish the contested documents to the Court for its *in camera* review. The Court also required the movants to file a privilege log identifying the date, author, addressee and description of the documents and the privilege claimed for each document. The movants filed a privelege log and then an amended privilege log. The movants claim a privilege for all documents under the work product doctrine. With respect to a few documents, they claim, in addition to work product, attorney-client privilege, common interest privilege, or both.

As may be expected, the Independent Counsel has a much different view of the subpoenaed documents. He notes that the subpoenas were issued as part of Independent Counsel's grand jury investigation into possible criminal violations involving the death of Mr. Foster and to determine whether individuals made false statements or obstructed justice in connection with the investigation into the firing of employees of the White House Travel Office

in May 1993. The Independent Counsel disputes the movants' claim that the work products doctrine is applicable under the facts in this matter based upon his contention that the grand jury "ordinarily" has a right to obtain "all" relevant non-privileged evidence and further because the documents were not prepared in anticipation of litigation. Independent Council goes on to argue that even if a document was prepared in anticipation of litigation, that alone will not exempt it from production to the grand jury. He argues that a balancing test must be applied to determine whether disclosure is nevertheless warranted. Independent Counsel also argues against invocation of attorney-client privilege and the common interest rule. Finally, the Independent Counsel draws a distinction between documents relating to conversations *before* the death of Vincent Foster and those documents created *after* his death.

The Court will now turn to a discussion of those privileges as they relate to the subject documents.

I

The most important issue raised in this document request is whether the documents sought by the Independent Counsel are protected from production under the work product doctrine. Any discussion of that doctrine or privilege must begin with the decision in *Hickman v. Taylor*, 329 U.S. 495, 76 S.Ct. 385 (1947). There, the Supreme Court observed:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion of opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant

from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. *This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways*—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. And the interests of the clients and the cause of justice would be poorly served.

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's cases, discovery may properly be had.

329 U.S. at 510-11, 67 S.Ct. A 393-94 (emphasis this Court's). Thirty-four years later, the Supreme Court reaffirmed the "strong public policy" underlying the work product doctrine in *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160 (1975). *Upjohn Company v. United States*, 449 U.S. 383, 398, 101 S.Ct. 677, 686 (1981).

The Court of Appeals for this Circuit has made clear that the work product doctrine applies to matters pending

before a federal grand jury. *In re Sealed Case*, 308 U.S. App.D.C. 69, 29 F.3d 715 (1994). Moreover, that case is instructive because the court noted:

> In rejecting the appellant's assertion of the privilege, the district court indicated that the privilege was inapplicable because no grand jury investigation had commenced at the time. We disagree. The work product privilege protects any material obtained or prepared by a lawyer *"in the course of his legal duties, provided that the work was done with an eye toward litigation."* Even though the grand jury investigation had not begun when the Lawyer met with the appellant and prepared his file, he may well have had an eye toward litigation.

308 U.S.App.D.C. at 72, 29 F.3d at 718 (citations omitted, emphasis this Court's). The court went on to state: "In determining whether the materials in the Lawyer's files are protected by the work product privilege, 'the testing question is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id* (citation omitted).

Although the movants resisted the preparation of a privilege log, the Court required them to submit a privilege log to the Court and Independent Counsel. After reviewing the privilege log, Independent Counsel advised the Court and the movants that the "the log has enabled us to cull out documents that we do not need or that are, in our view privileged. We thus are able to focus our argument to this Court on particular classes of documents."

II

Before addressing the documents now identified by the Independent Counsel based on the privilege log, the Court finds that all of the documents were prepared in anticipa-

tion of or with an eye toward litigation. This finding is based upon the affidavit of Mr. Hamilton and the Court's *in camera* review of the documents. The Court also observes that general experience in matters of this nature cannot help but lead all but the most unsophisticated person to conclude that there would be an investigation into the facts and circumstances of Mr. Foster's death and that an eager media would seek to obtain materials which the family may wish to hold private. Moreover, political reality makes very clear that the matter would be subject to grand jury investigation, Congressional hearings and intense public scrutiny. It can hardly be doubted that, as Mr. Hamilton has stated, the material was collected with an eye toward litigation in one form or another.

After reviewing the privilege log, the Independent Counsel identified specific documents he wanted produced. The Court concludes that, with respect to those documents not so identified, the Independent Counsel has withdrawn his request for their production. As has the Independent Counsel, the Court will identify the documents by their "Bates" number or numbers. The Court will now discuss the documents in the order identified by Independent Counsel in his opposition to the motion.

Documents 2774-2883.

Independent Counsel has requested Documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains handwritten notes and notations in the form of comments and under linings made by James Hamilton. Movants assert a work product privilege and describe the document as "Handwritten notes on 7/2/93 White House travel Office Management Review Report made in anticipation of meeting with Vincent Foster concerning possible representation." The Court finds that this document, as described in the privilege log, should be exempt from disclosure to the grand jury. It contains notes and underlining which represent the mental impressions of the attorney. Although this document was prepared before Mr. Foster's death, the Court concludes that Foster was consulting Hamilton as an attorney and possibly to represent him. Finally in applying the balancing test for this document, the Court finds nothing in the document which would suggest that the grand jury's need for the document outweighs the privilege. This document need not be produced.

* * * *

[Two paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

* * * *

With respect to Hamilton's meeting with Foster on July 11, 1993, the Independent Counsel seeks documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains some handwritten notations in the form of comments and underlining made by James Hamilton. The Court finds that the movants have properly asserted work product with respect to this group of documents. Certainly there was a concern about the implications of certain actions and decisions of the White House Counsel and Mr. Hamilton reviewed the documents with this in mind. The notations and underlined portions of the document is evidence of Hamilton mental impressions.

Documents 490-492, 528-30, 569-71.

These documents are described in the privilege log as "[h]andwritten notes regarding conversation with Vincent Foster about possible representation." Movants claim work product and the attorney-client privilege. The three documents appear to be copies of the same document. Hamilton is the author of the notes. The Court concludes that the notes are privileged. They were made at a time when Hamilton met with Foster to discuss possible representation of Foster. It appears clear that Foster spoke

with Hamilton as an attorney and a review of the notes supports that finding. Moreover, one of the first notations on the document is the word: "Privileged," so it is obvious that the parties, Hamilton and Foster, viewed this as a privileged conversation and the notes of that conversation as privileged, both under the attorney-client privilege and as work product. These notes and others that are discussed are a demonstration of why "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. at 510, 67 S.Ct. at 393. The written notes reflect the mental impressions of the lawyer and there is nothing in the record which suggests that any need by the grand jury trumps the privileges. The documents need not be produced.

* * * *

[12 paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

* * * *

In sum, the Court concludes that the documents are privileged for the reasons stated above and further, that in applying a balancing test, the need of the grand jury does not outweigh the privileges asserted.

The Court has reviewed the remaining documents, including those no longer requested by the Independent Counsel, and concludes that they are privileged for the reasons stated in the privilege log.

It is hereby

ORDERED that the motions to intervene filed by Lisa Foster and Sheila Anthony are granted, and it is further

ORDERED that the motion to quash or modify grand jury subpoena is denied in part and granted in part; the motion to quash the subpoena is denied, and the motion to modify is granted in that, consistent with this Memo-

randum Order, Swidler & Berlin is not required to produce the documents described in the privilege log.

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

[Dec. 16, 1996]

APPENDIX E

RULES OF CIVIL PROCEDURE

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * * *

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the

person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

* * * *

APPENDIX F

RULES OF EVIDENCE

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933.)